Supreme Court, U.S.
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No. 10-327

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In The Supreme Court of the United States

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Under the fee-shifting Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (November 26, 1997), codified as 18 U.S.C. § 3006A note), when is a fee award to a prevailing criminal defendant authorized under the statutory standard that the "position of the United States was vexatious, frivolous, or in bad faith"? In particular:

(a) Is either "vexatious" or "frivolous" assimilated with a "probable cause" standard similar to that utilized under the Fourth Amendment or in Grand Jury proceedings?

(b) Is "vexatious" redundant in whole or in part with "frivolous" or "bad faith," or does "vexatious" refer to the manner in which the criminal proceeding was conducted?

(c) Does "position of the United States" exclude consideration of the government's retained private expert analysts or witnesses who engaged in activity otherwise within the meaning of "vexatious, frivolous, or in bad faith," had they been performed by government employees?

(d) Is the government privileged under Hyde to present a theory of prosecution that is specifically excluded by the underlying criminal charging statute?

2. Under the fee-shifting Hyde Amendment (cited above), does the statutory cross-reference to "the procedures and limitations (but not the burden of

proof) provided for an award under section 2412 of title 28" preclude or limit the prevailing defendant's access to ordinary civil discovery procedures in support of his Hyde motion?

3. Is the Ninth Circuit's recently reformulated standard of "clearly erroneous" review, as enunciated in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009)(en banc), and applied in this case to set aside the district court's findings of fact, consistent with the ruling decisions of this Court, and particularly with *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985)?

List of Parties

All parties to the proceeding below are listed in the caption. There are no corporate parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. 10-

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mark Capener respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The original opinion of the court of appeals (1a-27a),[1] is reported at 590 F.3d 1058 (9th Cir.

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[1] Citations to "-a" are to pages of the appendix to this petition. Citations to "DD-" are to the document number of documents contained in the docket of the

2010). The amended opinion of the court of appeals, issued in connection with its denial of rehearing and rehearing en banc (28a-55a) is reported at 608 F.3d 392 (9th Cir. 2010). The relevant district court opinion and order (56a-66a) is unreported.

Jurisdiction

The judgment of the court of appeals was entered on January 10, 2010 (1a). An order denying rehearing and rehearing en banc was entered on June 9, 2010 (28a-29a), in connected with the issuance of the amended opinion of the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statute Involved

The principal statute involved in this case is the fee-shifting[2] Hyde Amendment, Pub. L. No. 105-

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district court (no. 3:05-0114-RCJ-RAM). Citations to the Excerpts of Record in the court of appeals are to pages of the following: "ER" for the government's excerpts of record; "SER" for the defendant's supplemental excerpts of record; "GFER" for the government's further excerpts of record; "DFER" for the defendant's further excerpts of record.

[2] We refer to the statute involved as the "fee-shifting" Hyde Amendment in order to distinguish it from other legislation also popularly known as the "Hyde Amendment," such as the provision regarding the public funding of abortion services. This case does not involved abortion.

119, Title VI, § 617, 111 Stat. 2519 (November 26, 1997), codified as 18 U.S.C. § 3006A note, which provides in full as follows:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision

> to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

STATEMENT OF THE CASE

This case stems from an unjustified federal criminal prosecution against a physician, attacking his lawful practice of medicine. What is distinctive about the case–but neither unique nor unusual in current prosecutorial practice–is that the prosecution never had any basis in evidential fact. Instead, the case was instigated on statistical analysis and pressed through trial on unfounded speculation masquerading as expert opinion, assisted by a violation of the government's discovery obligations, which unfairly surprised the defense on the first day of trial, and further multiplied the costs of defense.

In practical effect, the government's prosecutorial approach shifted the burden to the defendant of proving his innocence. This he did, ultimately obtaining a judgment of acquittal on all 52 counts charged against him, but at enormous effort and expense, incurring some $1.4 million in attorneys' fees and other defense costs. Even so, the government very nearly accomplished its goal of convicting the innocent on false stories made up by "experts," and it did achieve its goal of destroying most of the defendant's financial net worth.

In 1997, Congress enacted the fee-shifting Hyde amendment precisely to provide some recompense to such victims of unjustified federal criminal prosecution. In this case, the district court applied that statute to make a partial award to the defendant, on a finding that the government's case was frivolous in part. The court of appeals reversed that award because it viewed the evidence differently from the district court. While the court of appeals' application of clear error doctrine is deviant, its crabbed construction of the fee-shifting Hyde amendment continues a pattern of outcomes in the lower federal courts. Though the lower courts disagree on the meaning of key provisions of the statute, they are mostly hostile to the Congressional purpose of providing relief to the unjustly prosecuted.

The fee-shifting Hyde Amendment is an important federal remedial statute that has never been construed by this Court, and has produced divisions of authority in the lower courts. But most fundamentally, the lower courts' interpretations have frustrated the Congressional intent to restore balance and fairness to the federal prosecution function. This Court should grant certiorari to resolve these problems.

Statement of Facts: The Underlying Criminal Prosecution

Dr. Mark Capener–the Petitioner here, and defendant below–is a duly licensed physician specializing in Ear, Nose, and Throat (ENT) surgery. In 1999, following the completion of his specialty

training in Buffalo, New York, Dr. Capener moved to Elko, Nevada, and set up his practice there, at the invitation of a local hospital. Unbeknownst to Dr. Capener at the time, he had been placed in the middle of a "civil war" within the local medical community.[3] Prior to Dr. Capener's arrival, there had been no resident ENT surgeons in the Elko area, which had been served by a group of entrenched physicians resident in Reno,[4] and the hospital's invitation to Dr. Capener had been designed to rectify that situation.

After Dr. Capener had declined the invitation to join with them, the entrenched physicians mounted a campaign of opposition to him, including an unsuccessful effort to deny him hospital privileges upon his arrival, a series of complaints to the Nevada Medical Board, and assistance in bringing several malpractice cases against him, all of which came to naught. However, by early to mid-2001, the entrenched physicians had begun

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[3] The phrase was that used by Dr. Bishop, another local medical practitioner, who so testified at trial (SER1106).

[4] Through various interlocking relationships, this group contained five physicians - Drs. Dooley, Ludlow, Mathis, West, and Zamboni - all of whom ultimately gave testimony against Dr. Capener, either at trial or in the government's post-trial opposition to the Hyde motion, or both. Dr. Dooley also acted for the government as a coordinator of expert testimony against Dr. Capener. *See* DD82, exhibits 1-11 (reprinted at SER64-84).

collaborating with a regional health insurance carrier, Great West, which eventually became the government's principal complaining witness,[5] to develop the allegation that Dr. Capener was performing "excessive" sinus surgeries.

The Investigation

Great West initially took its complaint to Nevada state officials, who sought to involve their federal counterparts, including the FBI and the U.S. Attorney for Nevada. An assistant Nevada state attorney general, Ms. Rhonda Clifton, was appointed as a Special Assistant United States Attorney, and thereafter became the lead prosecuting attorney for the federal government through trial, assisted by a regular AUSA, Mr. Ron Rachow.

In March 2002, the lead FBI agent, Ms. Anna Brewer, led a raid by federal and state agents on Dr. Capener's medical office in Elko, seizing large amounts of records and conducting the interview with Dr. Capener that was designed to set up the government's eventual "false statement" count. (*See* SER932). Thereafter, the investigation went underground, cloaked in Grand Jury secrecy, for the next three years.

Few details have emerged from this three-year interregnum, but what became clear from

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[5] Two employees of Great West testified against Dr. Capener at trial. Like nearly all of the government's witnesses, they had no firsthand knowledge of the underlying events. (*See* SER920-23).

subsequent revelations is that the government gave very little attention to investigating the facts, or, if it did so, it hid the evidence.[6] The government was engaging the services of various experts to developed theories ungrounded in the facts. Among these were a "coding" expert–a nurse claiming expertise in the Current Procedural Terminology or "CPT" codes used in medical billing systems- which was to form the basis for the government's indictment (*see* DD82, exhibit 12, reprinted at SER85-104); and its lead medical expert, Dr. Rice.[7]

Finally, in May 2005, an indictment was returned against Dr. Capener, but it was kept under seal until a superseding indictment was produced in July 2005–some 40 months after the raid on Dr.

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[6] As Great West was the health insurance carrier for many of the patients, the government had access to at least those patients' prior history through its primary complaining witnesses. We still do not know how much the government learned through this channel.

[7] Dr. Rice apparently had been referred to Ms. Clifton by regular AUSA Tanya Treadway, who had used Dr. Rice to convict a Dr. Daniels in the District of Kansas. (*See* ER88-89, which is Treadway's affidavit as submitted in the Hyde proceedings below). That Kansas prosecution provided the template for the prosecution against Dr. Capener. *See United States v. Daniels,* 188 F. Supp. 2d 1309 (D. Kan. 2002), 159 F. Supp. 2d 1285 (D. Kan. 2001); 95 F. Supp. 2d 1160 (D. Kan. 2000).

Capener's office–and the superseding indictment became the definitive charging document. (DD1 & 4).

The Indictment and Pretrial Proceedings

The superseding indictment contained 52 counts, of which 38 were laid under the health care fraud statute, 18 U.S.C. § 1347–one for each of 38 named patients of Dr. Capener–and 13 essentially redundant counts were laid under the mail fraud statute, 18 U.S.C. § 1341.[8] The remaining 52d count was a false statement charge under 18 U.S.C. § 1001.[9]

The indictment (DD4, reprinted at ER98-111) was prolix and self-contradictory. In most instances, multiple procedures for the 38 named patients were attacked, with the result that some 71 separate surgical procedures were placed at issue. As to each one of the 71 attacked procedures, the indictment made the inconsistent allegations that the surgical procedures were done unnecessarily, were not done at all, or were not done (or not "documented") adequately. In each instance, the attack was structured around the CPT code used in billing, and

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[8] These counts were redundant in that they embodied a subset of 13 of the 38 named patients covered by counts 1-38. These 13 apparently were selected because each one was insured by Great West, which had become the principal complainant.

[9] The original jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

the allegations were hair-splitting (e.g, CPT 31288 was "fraudulently" billed rather than CPT 31287, where the only difference was whether tissue was removed from the sphenoid sinus).

From the outset, the defense objected to the use of the federal criminal fraud statutes to charge what at most was a civil case, and in particular to the use of 18 U.S.C. § 1347 to criminalize what amounted to a difference of professional opinion. On those grounds, as well as the prolixity and incoherence, in May 2006, the defendant moved to dismiss the indictment, and also to strike certain prejudicial allegations. (DD82 & 84). The motion to dismiss was denied, and the motion to strike only granted in part, but the district court ultimately did get the point. On last consideration of the dismissal motion in August 2006, the district court admonished the government that it would not be permitted to dress a civil malpractice case in criminal garb, and it also required the government to remove the most glaring inconsistencies of the indictment. Thereafter, the government split its fraud counts into two types: (1) the "necessity" counts, which did not contest whether the surgery took place, but rather argued that it was unnecessary; and (2) the "not done" counts, which purported to argue that the challenged surgery–or, more precisely, surgery justifying the given CPT code–did not take place.

It is important to bear in mind that the government's case was still splitting hairs. As to all of the 71 challenged surgeries, including the "not done" counts, there was never any question that a

surgical sinus procedure took place on the dates and times involved, in the hospital and on the patient in question, or that Dr. Capener was presenting and performing the surgery.[10] All of these surgeries were performed in hospital settings, with nurses and anesthetists present, and were amply documented in the hospital records. Rather, the government's case rested on fine distinctions as to exactly what sinuses had been involved (among the eight human sinuses), or exactly what Dr. Capener did while inside one or more of those sinuses. The government neither had nor presented any direct evidence on any of these matters; its case rested entirely on drawing highly attenuated inferences.

Like the "not done" counts, the government's "necessity" counts also unraveled when exposed to the light of day. The indictment had alleged that surgeries were "unnecessary" because "the patient could have been treated medically without surgery" (paragraph 10 of the indictment, DD4, p.7 (ER104)). Especially in light of this allegation, the defense was surprised to find very little documentation within the government's basic discovery indicating that the government had looked into the medical histories of the patients in question. Accordingly, the defense sought to use subpoenas to secure the production of

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[10] Aside from the Daniels prosecution in Kansas, the only comparble case of which we are aware is *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004), but in that case, the allegation was that the physician was not even in the building at the time and place that the services were performed. That is a far cry from the type of allegations involved in this case.

the records of the patients' prior treating physicians, before being referred to Dr. Capener for surgical evaluation. Over the government's prolonged opposition,[11] eventually those subpoenas were obtained, and many thousands of pages of prior treatment records were reviewed. The records showed that the indictment's allegation was false, as these patients in fact had received prior treatment with medication, without success.[12]

The defense also moved successfully for a district court order directing that the parties exchange detailed expert witness statements under Criminal Rule 16, sufficient to show the basis of the prospective expert testimony under Evidence Rule 702. When the statements were exchanged, the defense moved to strike the government's statements as inadequate, thus providing another opportunity for the district court to end the prosecution. That motion also was denied.

However, and unknown to the defense at the time, the government's expert witness statements also contained the material omission of one of the principal theories intended to be presented through Dr. Rice, which came to be known in the court of appeals as the "bone fragments" theory.

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[11] Here again, the government followed the Daniels model from Kansas. DD60, at 3-4, reprinted at SER7-8.

[12] This analysis was performed by another defense expert, Dr. Carpenter. DD128, exhibit 4 (reprinted at SER163-219).

The Trial and Acquittal

The government's case against Dr. Capener went to trial by jury over 20 trial days, beginning on September 28 and ending on November 2, 2006, with a judgment of acquittal on all counts. A few of the counts (or sub-counts) were abandoned by the government at the beginning of trial, and two others were dismissed sua sponte by the district judge in the midst of trial, on the basis of the malpractice-like evidence that the government presented. After the close of the evidence, the district court dismissed all of the remaining "necessity" counts under Criminal Rule 29, upon defense motion. The remaining 25 counts–including 24 "not done" counts and the one false statement count–were submitted to the jury, which returned not guilty verdicts on all counts submitted.

On the first day of evidence at trial, October 2, 2006, the "bone fragments" theory was first exposed by the government through Dr. Rice's testimony. This theory was one of two supporting the "not done" counts, and consisted in the inferential argument that the absence of bone fragments in pathology specimens from certain surgeries supported the inference that the particular surgeries claimed had not taken place. This created two problems. First, as the theory had been omitted from the government's expert witness statements, the defense was surprised, and moved for leave to serve subpoenas for the pathology specimens and the pathologist's testimony, and in the alternative for dismissal. Second, as shown because the defense

was successful in obtaining access to the underlying facts, the "bone fragments" theory was false.

Although Dr. Rice had testified in terms of what the pathology specimens had contained, it turned that Dr. Rice had neither examined the specimens nor spoken with the examining pathologist, Dr. Mardini. As ultimately re-formulated in Dr. Rice's post-trial affidavit, he had drawn an inference from Dr. Mardini's written reports, that when the reports do not mention bone fragments, there are none in the specimen. Dr. Mardini himself was subpoenaed by the defense and testified that the mention of bone fragments follows no such pattern, as the purpose of the pathologists' examination is to look for disease in the removed tissues, and not to determine the presence or absence of bone fragments, which lack diagnostic significance.

Moreover, the defense also was successful in obtaining the pathology specimens themselves. Due to standard staining procedures used in preparing the pathology slides, the presence or absence of bone fragments is shown by distinctive coloration. Thus, everyone in the courtroom, including the judge and the jurors, could see the truth that all of the contested specimens contained bone fragments. Thus, the bone fragments theory was demolished.

However, the bone fragments episode was not unique. Both Dr. Rice and another expert, Dr. Bolick, testified to the inferential theory that, in those cases were specimens were not submitted for pathologists's examinations, it means that the

surgery was "not done." That theory also turned out to be false, as the defense established by calling the hospital personnel who actually handled such submissions in the hospital on the occasions in question. (SER1110-29).

Dr. Rice also added a further theory on the "not done" counts, which is that the time shown in the operative reports was insufficient to complete the surgeries in question.[13] The defense also proved that theory to be false, by showing a video, narrated by defense expert Dr. Kountakis, in which Dr. Capener does it. (SER1018-33).

On the parallel "necessity" counts, the government's theory, again presented through Dr. Rice, was that the findings on pre-operative Computerized Tomography scans were insufficient to justify the extent of surgery performed by Dr. Capener. This theory turned out to be nothing more than a difference in medical opinion. By his own admission, Dr. Rice favored a "minimalist" approach to sinus surgery, but it has been long known that CT findings do not correlate well with patients' symptoms and response to treatment. As simply put by the defense expert, Dr. Kountakis, "the goal of surgery is not to make an X-ray look better, but to help the patient feel better." (DFER4).

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[13] Once again, this argument had been borrowed from the Daniels prosecution in Kansas. Dr. Rice did not have any data at all to support this theory; he just made it up.

At the close of the evidence, the district court dismissed all of the government's remaining "necessity" counts as unfounded in both fact and law. They were unfounded in fact because the patients's prior medical records–those that had been obtained by defense subpoenas over the prosecution's objection–showed "in every case" that prior medical treatment had been tried unsuccessfully. (SER1228-36). They were unfounded in law because the differing approaches to surgery represented nothing more than a difference in medical opinion, which the enacting Congress had expressly excluded as a basis for criminalization under 18 U.S.C. § 1347.

The trial judge also had indicated his inclination to dismiss the "not done" counts, but changed his mind over a weekend break, and sent those counts to the jury. While we believe that this ruling was incorrect, we do not know what the court would have done with a guilty verdict, as the jury came back with not guilty verdicts on all remaining counts.[14] We do know that the same trial judge ultimately found that the government's presentation of the "bone fragments" theory, which related to the counts that were allowed to reach the jury, was frivolous.

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[14] Actually, the district judge virtually directed a verdict for the defense, by instructing the jury on the meaning of CPT codes (SER1236-37), thus resolving another silly point that the government had pressed, which was that part of the frontal sinus was not covered by the frontal sinus CPT code.

The Fee-Shifting Hyde Amendment Proceedings and Decisions Below

Upon the judgment of acquittal, the defendant moved for fees and expenses under the Hyde Amendment, and, in the alternative, for discovery in aid of his application, to the extent not granted. (DD228). After taking written submissions and oral argument, the district judge announced his intention to make a partial award of fees and expenses, measured by those incurred by the defense in refuting the "bone fragments" theory, and directed the parties to make submissions regarding the amount of fees.

In connection with its award of approximately $280,000 in fees and expenses to the defense, the district court rendered an opinion and order dated June 18, 2007 (a56-66), making findings and conclusions, based upon the parties' Hyde submissions, and upon the trial evidence and the other evidence of record. The court's principal finding is that the "bone fragments" theory was frivolous:

> "a showing of frivolousness may be made based on a finding that the prosecution had "reason to believe" its case had no support. See [United States v] *Braunstein*, 281 F.3d at 996. In this case, the Government had reason to believe that its fraud theory based on the absence of bone in the pathology slides lacked merit.

"Prior to trial, the Government interviewed Dr. Mardini, the pathologist who produced the reports. At trial, Dr. Mardini testified that contrary to the Government's assertion, bone fragments existed in all the pathology slides, and that he would have so told anyone who asked him before trial. The evidence confirmed that Capener's pathology slides contained bone fragments. This showing completely destroyed one of the Government's main arguments in support of its case. As noted above, the Government interviewed Dr. Mardini and discussed the case with him before trial. The Government contends it did not ask Dr. Mardini about the pathology reports. While Dr. Mardini provided a sworn affidavit wherein he stated that he did "not recall whether [he] was ever specifically asked about the presence of bone in the slides" (#243-2 at 2), he did confirm that his investigation conclusively demonstrated bone fragments in the pathology reports for Capener's surgeries. Either the Government consciously decided to proffer a theory it knew was false, or it failed to conduct any investigation or inquiry to confirm whether Dr. Rice's contentions regarding lack of bone fragments was in fact accurate. In addition, the Government failed to produce to Capener expert disclosures

> from Dr. Rice, which discussed the lack of bone as a basis for his opinions. Taken together, these facts indicate the Government had reason to believe their lack-of-bone theory was without support. The Government had the ability to overcome Dr. Rice's failure to investigate the basis for his opinion regarding the lack of bone in the pathology slides. In this regard, this case is on point with Braunstein. Accordingly, the Court finds that the Government pursued frivolous claims as to the fraud-related counts based on the Government's first pillar – the lack of bone in the pathology reports from surgery."

(61a-63a).

The government took an appeal from the partial award, and the defense cross-appealed for a full. Following briefing and argument, the court of appeals reversed the partial award, and rejected the cross-appeal, in an opinion issued on January 10, 2010 (1a-27a). The defendant made a timely petition for panel rehearing and rehearing en banc, primarily on the ground that the court of appeals' opinion had overlooked its own recent en banc decision in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009), which had recast the applicable standards of "abuse-of-discretion" and "clearly erroneous" review, avowedly to make those standards more deferential to the district court. Nevertheless, the panel adhered to its original

decision setting aside the district court's finding as "clearly erroneous," and therefore an abuse of discretion, and issued an amended opinion (29a-65a) that now included a citation to the *Hinkson* and made other minor wording changes at several points. With that amended opinion, the court of appeals issued an order (29a) dated June 9, 2010, denying both panel rehearing and rehearing en banc.

REASONS FOR ALLOWING THE WRIT

I. The Standards Applicable Under the Fee-Shifting Hyde Amendment Present Important Questions of Federal Law that Have Divided and Confused the Lower Courts, and Should Be Settled by this Court.

In the thirteen years since its enactment, the fee-shifting Hyde Amendment has not been considered or construed by this Court. Although the statute has been interpreted in a number of circuit and district court cases, the lower courts have not reached convergence, even on the fundamentals of what its key provisions of "vexatious, frivolous, or in bad faith" actually mean, or whether they are fully distinguishable from one another.

While this doctrinal dissonance alone would be sufficient to justify review in this Court, there appears to be an even more fundamental problem at work. Whatever their disagreements, the lower courts, and especially the courts of appeals, are grudging in their construction of the scope of the remedy provided by the fee-shifting Hyde Amendment. This appears to reflect an inappropriate transference into this field of prudential concerns more akin to those influencing constitutional criminal procedure, which are entirely out of place in construing what in fact is a very limited and mild statutory remedy supplied by Congress, and applicable only to federal prosecutions.

Therefore, we should begin with a clear understanding of what the fee-shifting Hyde

Amendment is, and is not. The statute is limited in its scope: it applies only to a subset of prevailing defendants in federal prosecutions. Unlike many protections of constitutional criminal procedure, it involves no problem of establishing a lowest-common-denominator standard to govern both federal and state authorities in a myriad of circumstances. It involves no remedy that suppresses probative evidence, or requires non-merits dismissals of potentially meritorious charges. It does not interfere in any way with the Grand Jury process, or with the Executive Branch's authority to investigate and charge as it will, or with the Judiciary's authority to adjudicate. It does not sanction any individual officer of the government. It is not punitive; its scope is entirely compensatory, and only partially so. The responsibility affixed is institutional only, and reflected only in an assessment to the prosecuting agency's appropriated funds. As such, it requires only that the costs of prosecutorial overreach be spread across all taxpayers, rather than being concentrated, to personally ruinous effect, in a single, unfortunate, middle-class defendant,[15] who by definition has prevailed against the government. Surely, the authority to enact such a provision is well within the broad appropriation powers of Congress, and should be construed in accordance with its fair intendment,

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[15] The statute itself excludes those defendants "represented by assigned counsel paid for by the public," and through its reference to 28 U.S.C. § 2412, also excludes individuals with a net worth above $ 2 million, *see* 28 U.S.C. § 2412(d)(2)(B).

as it does not encroach upon the powers of any other Branch.

The central intent of protecting such individuals against the potentially ruinous financial consequences of a successful defense was clearly expressed by the legislation's sponsor, Representative Henry Hyde:

> "If you were to take a piece of paper and sit down and say, what is the most unjust thing in all of the law, you would have to say when you are pursued by somebody, and you are ultimately indicated, and you have to swallow what can be bankrupting costs."

143 Cong. Rec. H7791 (September 24, 1997). Representative Hyde had initially proposed that his bill be modeled closely on its civil counterpart, the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. § 2412, which provides for an award of fees to a prevailing party against the government unless the government proves that is position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A). As a result of objections raised during the floor debates, and in the newspapers by the Department of Justice, the standard of not "substantially justified" was replaced by the "vexatious, frivolous, or in bad faith" standard, and the government was relieved of its burden of proof. However, the basic intendment of the statute, to provide a modicum of fairness and justice to the victimized defendant, was not affected.

In the ensuing years, the lower courts have struggled with the meanings of "vexatious, frivolous, or in bad faith," without producing any satisfactory consensus and without a recognition of the remedial intent of the statute to create a safety valve for the federal criminal justice system that provides better justice for the individual caught in its toils, without impeding the efficacy of enforcement and prosecution . Sooner or later, this Court will be impelled to take up a fee-shifting Hyde Amendment case by the obvious imbalance between its remedial purpose and its crabbed construction by the lower courts. The present case provides an appropriate vehicle for that task.

A. The Lower Courts' Decisions Are Divided and Confused.

As the statute does not contain any definitions of the key terms of "vexatious, frivolous, or in bath faith," the lower courts largely have referred to dictionary definitions of those terms. Unfortunately, the courts have not used the same definitions or the same dictionaries, and sometimes have used different ones within the same case.

The early leading case was *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999), which relied upon selected definitions from both the 6th and 7th editions of *Black's Law Dictionary* to propose that "vexatious" meant "without reasonable or probable cause or excuse," 198 F.3d at 1299 (using the 7th edition), while "frivolous" meant the same thing as "frivolous action," defined as "groundless . . . with little prospect of success; often brought to embarrass

or annoy the defendant, " *id.* at 1299 (using the 6th edition), and "bad faith" as "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity," *id.* (using the 6th edition). *Gilbert*'s definitions have been adopted in some of the Circuits, and rejected in others, often with very limited consideration.

The Ninth Circuit has rejected the *Gilbert* definition of "vexatious," substituting a two-part test containing both objective and subjective elements, *United States v. Sherburne*, 249 F.3d 1121, 1127 (9th Cir. 2001); *United States v. Manchester Farming Partnership*, 315 F.3d 1176, 1182 (9th Cir. 2003), and the First and Second Circuits follow the Ninth in this respect, *United States v. Knott*, 256 F.3d 29 (1st Cir. 2001); *United States v. Schneider*, 395 F.3d 78 (2d Cir. 2005). However, the Fourth, Sixth, and Eighth Circuits follow the *Gilbert* formulation precisely, *In re 1997 Grand Jury (Bunn)*, 215 F.3d 430 (4th Cir. 2000); *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003); *United States v. Porchay*, 553 F.3d 704, 711 (8th Cir. 2008), as do district courts in the Tenth and D.C. Circuits, *United States v. Erwin*, 2010 WL 1816349 (E.D. Okla. 2010); *United States v. Wade*, 93 F. Supp. 2d 19 (D.D.C. 2006).

On the other hand, while the Ninth Circuit purports to follow the *Gilbert* definition of "frivolous," it actually evolved the definition in *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) into "obviously wrong," *id.*, as applied in that case to a failure to investigate adequately. In the present case, the district court found *Braunstein*

to be controlling (62a), but it was distinguished by the court of appeals, on the ground that the district court's finding did not identify an "affirmative reason to believe that its bone fragments theory was wrong" (44a-45a), thus apparently introducing some concept of passive versus active frivolousness.

A similar but more pronounced development occurred in the Sixth Circuit, *see Heavrin*, 330 F.3d at 723, the Eighth Circuit, *United States v. Beeks*, 266 F.3d 880, 883-84 (8th Cir. 2001); *United States v. Bowman*, 380 F.3d 387 (8th Cir. 2004), and in district courts in the Third and Tenth Circuits, ; *United States v. Milloy*, 75 F. Supp.2d 1276, 1277 (D.N.M. 1999)(using the actual *Black's* 7th edition definition of "frivolous" rather than "frivolous suit" (as in *Gilbert*) as "lacking a legal basis or legal merit; not serious; nor reasonably purposeful," while the First, Second, and Fourth Circuits have followed the *Gilbert* formulation more precisely. *See Bunn*, 215 F.3d at 437.

Two aspects of these developments have been particularly problematic. First, *Gilbert*'s formulation of "vexatious" as assimilating a concept of "probable cause" has produced much mischief, as "probable cause" is primarily a constitutional law or Grand Jury standard that was expressly rejected by the enacting Congress for use with the fee-shifting Hyde Amendment, *see* H.R. Rep. No. 105-405, 105th Cong. 1st Sess. at 194 (November 15, 1997)– a proposition that some courts have recognized, *see United States v. Manchester Farming Partnership*, 315 F.3d 1176, 1184 (9th Cir. 2003), and others have not, *see United States v. Isaiah*, 434 F.3d 513 (6th

Cir. 2006). A more recent and extreme development along these lines is the Eighth Circuit decision in *United States v. Porchay*, 553 F.3d 704 (8th Cir. 2008), which appears to hold that the existence of "probable cause" is a defense against both the "vexatious" and "frivolous" branches of the Hyde standard.[16]

Second, even in those Circuits, such as the Ninth, who have rejected the *Gilbert* standard, the substitute two-part test may be even worse. As "frivolous" generally is thought to be an objective test, and "bad faith" a subjective one, the combination of both objective and subjective elements would appear to render "vexatious" entirely redundant,[17] which cannot be a permissible interpretation.

This discussion could continue, more or less indefinitely. But enough has been shown to demonstrate the divisions and disarray in the lower courts. Given the developments to date, it does not seem likely that the lower courts will converge on any coherent construction of the statute, without further guidance from this Court. It need hardly be

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[16] In the present case, the government cited and relied upon *Porchay*.

[17] "[T]he two-part standard [for vexatiousness], without further refinement, seems at odds with the principle that statutes should not be read such that they render terms redundant," *United States v. Mitselmakher*, 2008 WL 5068609, at *11 (E.D.N.Y. 2008).

said that there are better sources of guidance than successive editions of *Black's Law Dictionary*, with its ever-changing definitions. For example, the best-known analog to "frivolous" is the one provided by Civil Rule 11, which establishes an objective standard of reasonable investigation; the best-known analog to "vexatious" is 28 U.S.C. § 1927, which is framed in terms of unreasonable "multiplication" of proceedings, even within a case otherwise having merit. It would anomalous indeed if federal criminal prosecutors were not held to a standard at least as rigorous as private civil lawyers.

Nor are we at sea, or limited to constitutional minima, in discovering the responsibilities in federal prosecutors for fairness and diligence respecting all concerned, including the defendant. We have a long tradition of that ethic, *see Berger v. United States*, 295 U.S. 78, 88 (1935), and contemporary standards in the form of the Department of Justice's own statements, such as the *United States Attorneys' Manual*, which set higher standards than the constitutional minima.

These questions certainly have sufficient importance to warrant this Court's attention. With record levels of incarceration in this country, and increasing public concern over the ever-expanding scope of federal criminal prosecution, this Court should consider a pre-existing statute that appears intended to restore and maintain public confidence in the fairness of the federal prosecution function.

B. The Court of Appeals' Endorsement of a "Reliance on Experts" Defense for the Government Creates a Dangerous Precedent.

In addition to the need for clarity and control of the standards for "vexatious, frivolous, or in bad faith," this case also presents an important question regarding the meaning of the statutory language referring to "position of the United States." This question can not wait for a division of authority to open up in the lower courts, because it creates an enormous loophole in the statute, and provides perverse incentives to federal prosecutors.

We are referring here to court of appeals' apparent endorsement of the government's argument that it could defend against a Hyde award by pleading "reliance" on its retained experts–in this case, Dr. Rice, who if not malicious was certainly incompetent--as an excusing condition for lack of duly diligent investigation (*see* 45a-48a). This holding, for which there is no applicable authority other than the decision below, sets a dangerous precedent that seems to authorize, and perhaps to encourage, the delegation of portions of the federal prosecution function outside the Executive Branch, and indeed outside the government entirely.

C. This Case Presents an Appropriate Vehicle for Review.

This case provides an appropriate vehicle for review on certiorari, for two principal reasons.

First, the case presents an array of issues preserved in a fully-developed record that includes a trial on the merits. In the district court, the Petitioner moved for fees under all three of the Hyde standards of vexatious, frivolous, and in bad faith, and also moved in the alternative for discovery in aid of the application. All of these points are preserved by the defendant's cross-appeal, and so remain live issues in the case.

Second, the substantive context of this case is an important one today, and will become still more important in the future, so as to warrant this Court's close attention. The principal charging statute against Dr. Capener was 18 U.S.C. § 1347, which is the capstone provision of federal health care law. With the recent expansion of federal involvement in the health care industry, this statute will become still more important in the future, and the potential for abusive prosecution will become far more harmful to the Nation's well-being. In the district court and on cross-appeal, the Petitioner argued that the government's use of 18 U.S.C. § 1347 in this context was improper, as it violated the Congressional intent that the statute *not* be used to criminalize differences in medical opinion as to the appropriate diagnosis and treatment of illness and disease. *See* H. R. Conf. Rep. No. 104-736, 104 Cong. 2d Sess. 258 (July 31, 1996). The court of appeals flatly held that there was "nothing improper about these aspects of the government's case" (25a;50a), because the government's presentation "to the effect that the surgeries were not actually necessary tended to show that Capener could not have subjectively believed they were necessary" (*id.*).

Note that this holding was rendered upon a record in which the district court had refused to allow the "necessity" counts to reach the jury, meaning that no reasonable or rational person could draw the inferences argued. Nevertheless, the court of appeals apparently held that any prosecutor anywhere could ask that such inferences be drawn, and would be doing "nothing improper."

If this ruling by the court of appeals is allowed to stand, then how is the Congressional purpose to be effectuated? Physicians already are concerned about second-guessing by health care bureaucracies and disgruntled patients. If federal prosecutors are added to the mix, and allowed to proceed solely on the idiosyncratic opinions of hired experts, with the unlimited resources of the federal government at their disposal, then the stakes will be raised beyond reason. Even if most defendants are fortunate enough, like Dr. Capener, to obtain a diligent judge and jury, and a vigorous defense, will they be willing to risk their personal liberty and expend millions in defense costs, without any hope of reimbursement if they are vindicated? If not, then who will practice medicine under such conditions? Particularly in a context as sensitive as this one, these questions are worthy of this Court's attention.

II. This Court Should Consider the Availability of Civil Discovery on Fee-Shifting Hyde Amendment Applications.

The court of appeals' decision below is one of the few to recognize the problem created by the need to construe the fee-shifting Hyde Amendment in pari

materia with the EAJA, especially as regards the availability of discovery in aid of a Hyde application. The Ninth Circuit previously has held that a district court has discretion to order to discovery on a Hyde motion, upon "good cause." *United States v. Lindberg*, 220 F.3d 1120 (9th Cir. 2000). While recognizing that authority, the court of appeals' ruled that the "exact scope" of that power "need not be decided here," because the district court was within its discretion (55a).

The more general problem is created by the cross-reference from the Hyde Amendment to the " the procedures and limitations" of the EAJA, as particularly construed in light of 28 U.S.C. § 2412(d)(1)(B), which provides that the "substantial justification" determination is to be made "on the basis of the record . . . which is made in the civil action." This may not cause a problem under the EAJA itself, as the government bears the burden in the civil case. But under the Hyde Amendment, where the burden is shifted and the standards more rigorous, it can create an insurmountable hardship to a prevailing criminal defendant. Civil cases simply are not the same as criminal cases. Furthermore, because Hyde Amendment proceedings themselves are civil matters, while the underlying case is criminal, it is not clear how the cross-reference is supposed to work.

As a result, there is a division of authority on the scope of discovery rights in support of Hyde amendment applications. *Compare United States v. Schneider*, 395 F.3d 78, 91 (2d Cir. 2005), *with United States v. Truesdale*, 211 F.3d 898 (10th Cir.

2000), *and United States v. Gardner*, 23 F. Supp. 2d 283 (W. D. Okla. 1998). The right to seek Hyde relief can easily become an empty gesture in the absence of some access to evidence held by the opposing party. To a very large extent, that is the problem in this case: the principal prosecutors ultimately chose to remain silent. That should not be an option after the prosecution is over, and the only question remaining is public accountability, which ultimately is the value secured by that statute.

III. The Ninth Circuit's Adoption of a New Standard for "Clearly Erroneous" Review Should Be Considered by this Court.

The petitions for rehearing and rehearing en banc below were impelled by two surprising developments in the original panel opinion. First, the court of appeals chose to rest its reversal on "clearly erroneous" review, which had not even been argued by the government. Second, having made that choice, the court of appeals' decision overlooked its own recent en banc decision in *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009)(en banc), which totally recast the Ninth Circuit's approach to defining both "abuse of discretion" and "clearly erroneous" standards of review.

Moreover, *Hinkson* itself was based on the Ninth Circuit's perception that of this Court's precedents– *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948), and *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949)–were in tension with one another in their definitions of "clearly erroneous"

review. *See Hinkson*, 585 F.3d at 1260-61. However, while apparently starting out to expand the deference due to district court findings of fact, *Hinkson* ends by ruling that:

> "even when a court of appeals determines a trial court's findings are "permissible" (Yellow Cab Co.) or not a "mistake" (U.S. Gypsum Co.), the court of appeals must reverse if the district court's determination is "illogical or implausible" or lacks "support in inferences that may be drawn from facts in the record."

Id. at 1261. Although this formulation borrows language from the currently ruling case of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), it seems inconsistent with *Anderson*'s holding, the essence of which is that courts of appeals may not choose between two permissible findings.

This implication is clearly demonstrated in this case by the application of *Hinkson* in the amended opinion issued upon the court of appeals's denial or rehearing (28a-55a), which seems even less deferential than the original. Apparently, confusion about the new test is not a unique reaction, because the Ninth Circuit itself is still dealing with *Hinkson*. In July, upon a further rehearing, Chief Kozinski changed his vote in that case. *See United States v. Hinkson*, 611 F.3d 1098 (9th Cir. July 14, 2010).

Even one Circuit's drift would be significant on a doctrine as important as clear error review,

which pervades may areas of law. However, as *Hinkson* and its application here also is in conflict with this Court's *Anderson* opinion, it provides an additional ground for granting certiorari.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/
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